HON'BLE SRI JUSTICE CHEEKATI MANAVENDRANATH ROY

Criminal Revision Case No.1116 of 2019

ORDER:

Assailing the order dated 24.08.2019 passed in Crl.M.P.No.89 of 2019 in Sessions Case No.63 of 2018 on the file of the Sessions Judge, Kurnool, whereby the petition filed under Section 227 Cr.P.C. by the petitioner, who is accused No.2, to discharge her from the case was dismissed, the present Criminal Revision Case is preferred by the revision petitioner.

Facts germane to dispose of this Criminal Revision Case may briefly be stated as follows:

The Sub-Divisional Police Officer, Kurnool laid charge-sheet against accused Nos.1 and 2 in Crime No.64 of 2015 of Kurnool III town Police Station after completion of investigation for the offences punishable under Sections 498-A and 302 of IPC and under Section 4 of the Dowry Prohibition Act and under Section 494 of the IPC against accused No.1 and for the offence punishable under Section 494 of IPC against accused No.2.

As per the charge-sheet, it is the case of the prosecution that the deceased by name Vishali is the legally wedded wife of accused

No.1. Their marriage was solemnized in Srisailam. Accused No.1 was working as Sub-Inspector of Police, Srisailam Police Station at that time. Father of the deceased Vishali gave good amount of dowry to accused No.1 at the time of the marriage. The deceased Vishali underwent a bypass surgery prior to the marriage. Knowing fully well that she has undergone a bypass surgery, accused No.1 married her. They both lead happy marital life after the marriage. However, Vishali could not conceive due to her heart ailment.

Whileso, accused was transferred to Sanjamala Police Station. While he was working at Sanjamala Police Station, he developed intimacy with accused No.2. Thereafter, accused No.1 started harassing the deceased. Therefore, she lodged a report with the police against accused Nos.1 and 2 and against mother of accused No.1 stating that accused No.1 has been harassing her to accept his second marriage with accused No.2 and that he is also trying to kill her by administering poison to her and as such she got life threat at the instance of accused No.2 and the mother of accused No.1 in the hands of accused No.1. The said report was registered as a case in Crime No.54 of 2011 for the offences punishable under Sections 498-A, 341, 306, 506 read with Section 34 of IPC of Sanjamala Police Station. However, at the intervention of the

elders and the mediators, both the parties entered into a compromise before the Lok Adalat on 06.02.2012 and the accused therein were acquitted under Section 320(8) Cr.P.C.

Thereafter, on the advice of the elders, accused and his wife Vishali started residing in Ganesh Nagar of Kurnool Town. Accused No.1 did not desist from harassing her for additional dowry. He continued to harass her. She used to inform the same to her parents over phone. When her father requested accused No.1 not to harass her, he did not heed to his request.

Whileso, on 10.03.2015 at about 11.45 A.M. after Vishali visited the house of her neighbor LW.6 Pothi Satyanarayanamma to know as to how to prepare Korra Rice and went back to her house, at about 12.00 Noon her neighbours LWs.6, 7 and 10 viz, Pothi Satyanarayanamma, K.Nikhil Reddy and Karnati Sagar Reddy, heard cries from her house. When they came out from their houses, they have seen accused No.1 coming out from the house. He informed them that his wife has fallen while cleaning the utensils. Therefore, the neighbours i.e., Lws.6, 7 and10 went to the house of accused No.1 and they have seen Vishali lying on her back with injuries in an unconscious state in her house. Immediately, accused No.1 along with the said witnesses shifted her to the

hospital and she was declared dead. On receipt of information from accused No.1, her parents immediately reached the hospital.

Three years prior to the death of Vishali on 10.03.2015, accused No.1 married accused No.2 and lead conjugal life with her. Accused No.2 was also blessed with two children. Accused No.2 lived at Kesavapuram village and accused No.1 used to visit her frequently. Her neighbours Lw.13 Ediga Nagaraju and LW.14 Kattubati Adbdul Shoriff Basha used to witness the frequent visits of accused No.1 to the house of accused No.2. Accused No.2 was an employee working as a teacher in a School.

On the report lodged by Lw.1 Inturi Narayana, who is the father of the deceased Vishali, after the death of Vishali, with Kurnool III Town Police Station, a case in Crime No.64 of 2015 for the offences punishable under Section 498-A, 302 r/w.109 IPC and Section 4 of the Dowry Prohibition Act was initially registered and police investigated the said case.

During the course of investigation, the Mandal Educational Officer of Holdagunda Mandal, Kurnool District, who is LW.12 Syed Mahaboob John, was examined and he stated that accused No.2 in her Service Register furnished the details of her spouse and

she has shown accused No.1 as her husband in it and also in her Health Card and Aadhar Card etc. Lws.13 and 14, who are the tenants along with accused No.2, stated that accused No.1 used to visit the house of accused No.2 and that accused No.1 is the husband of accused No.2. The Investigating Officer also collected the copies of regular employee details of accused No.2, her discharge card from the hospital, where she gave birth to her children etc., wherein it is stated that accused No.1 is her husband.

During the course of investigation, it has also come to light from the medical evidence that the deceased sustained injuries at the time of her death and she died due to asphyxia due to smothering. Therefore, as it is found that the death of the deceased was a homicidal death and as accused No.1 was found in her company at the time of her death, and on the basis of the evidence that was collected during the course of investigation, the Sub-Divisional Police Officer, Kurnool filed the final report i.e. charge-sheet stating that accused No.1 has committed the offences punishable under Sections 498-A, 494 and 302 of IPC and accused No.2 has committed an offence punishable under Section 494 of IPC.

After the committal Court has taken the said charge-sheet on to the file and committed the case for trial to the Court of Session, as the offence punishable under Section 302 of IPC is exclusively triable by a Court of Session, the said case was registered as Sessions Case No.63 of 2018 on the file of the Sessions Judge, Kurnool.

After accused Nos.1 and 2, made their appearance in the Sessions Court, accused No.2 has filed a petition under Section 227 Cr.P.C. to discharge her from the case on the ground that no evidence was produced by the prosecution to prove the factum of her marriage with accused No.1 and that the alleged documents viz., the regular employee details, Aadhara Card and hospital record wherein accused No.1 was shown as her husband are not valid documents in proof of the factum of her marriage with accused No.1 and these documents do not prove the offence of bigamy punishable under Section 494 of IPC. The date of marriage, place of marriage and essential ceremonies said to have been observed at the time of the alleged marriage are not mentioned in the charge-sheet. Therefore, there is no valid evidence in proof of the factum of second marriage and the evidence collected by the Investigating Officer during the course of investigation is not

sufficient to prove the second marriage and the offence of bigamy punishable under Section 494 IPC and as such, there are no valid grounds to frame a charge against her for the offence punishable under Section 494 of IPC and thereby prayed to discharge her from the case.

The Public Prosecutor filed counter opposing the said petition. He stated in the counter that accused No.1 harassed the deceased to give consent for marrying accused No.2 and the evidence collected by the Investigating Officer shows that accused Nos.1 and 2 lived together as husband and wife and they begot children and evidence in the form of photographs was also collected to show that accused No.1 has celebrated the "Sreemantham" function when accused No.2 became pregnant and accused No.2 also has shown accused No.1 as her husband in her Service Record, Aadhar Card and hospital record and the said evidence is sufficient to prove that there was a second marriage between accused Nos.1 and 2, which constitutes an offence punishable under Section 494 IPC. Therefore, he prayed for dismissal of the petition.

After hearing the petitioner and the prosecution, the learned Sessions Judge by the impugned order dismissed the said petition and refused to discharge accused No.2 from the said case.

Aggrieved thereby, accused No.2 has filed the present Criminal Revision Case questioning the legality and validity of the impugned order.

Heard Sri S.Nagamuthu, learned senior counsel appearing on behalf of Sri Virupaksha Dattatreya Gouda, learned counsel for the petitioner, and learned Additional Public Prosecutor for the 1st respondent-State. None appeared for the 2nd respondent –*de facto* complainant.

Learned senior counsel for the revision petitioner would contend that as per the settled law in this regard to prove an offence of bigamy punishable under Section 494 IPC, it is imperative on the part of the prosecution to prove that both the first marriage and the second marriage are valid marriages and that the second marriage is also performed as per the customs prevailing in the caste of the parties to the marriage and that all essential ceremonies required to perform a valid marriage are observed and that second marriage was also performed as per the said essential ceremonies prevailing in the caste. He would submit that the prosecution has to prove that the second marriage has in fact taken place and the said factum of the second marriage has to be proved like any other fact with acceptable legal evidence. He

contends that there is absolutely no evidence to prove the factum of the second marriage and also that the said second marriage was solemnized by observing all the essential ceremonies of a valid marriage. He then contends that the evidence collected by the Investigating Officer in the form of entries in the Service Register, Aadhar Card and the hospital record of accused No.2, wherein accused No.1 was shown as husband of accused No.2, is not valid evidence in proof of the factum of the second marriage or that the marriage was performed with essential ceremonies required to establish a valid marriage as required under Section 494 IPC to prove the offence of bigamy. He would submit that these documents at best only prove that they are in cohabitation with each other or that they are in live-in relationship. He also contends that the charge-sheet do not disclose as to when the marriage took place, where the marriage took place and in what form the said marriage took place and what are the essential ceremonies that were observed at the time of the alleged second marriage. He submits that there is no evidence at all in proof of the factum of the second marriage. Therefore, there is absolutely no legal evidence on record to establish that any offence punishable under Section 494 of IPC was committed by the revision petitioner. So, there is no

authenticated material to prove the guilt of accused No.2 for the said offence and as such, the charge against her under Section 494 IPC would be wholly groundless.

The learned Senior Counsel for the revision petitioner then contends that even though the offence under Section 494 IPC, which was earlier a non-cognizable offence, is now made a cognizable offence in the State of Andhra Pradesh on account of amendment made to that effect in Cr.P.C. and Police got absolute power to register the case and investigate the same, that Section 198 Cr.P.C. which imposes a bar on the Court to take cognizance of the case unless a complaint was filed by the person aggrieved of the said offence is not amended and it still remains as it is in the Code and as such, the Court cannot take cognizance of the case for the offence punishable under Section 494 IPC based on the police report/charge-sheet filed by police under Section 173(2) Cr.P.C. and as such, taking cognizance of the case for the offence punishable under Section 494 IPC in the instant case on the basis of the charge-sheet filed by the police in this case is *ex facie* illegal and unsustainable under law. Therefore, on the said ground also, he would contend that the petitioner, who is accused No.2, is entitled to be discharged from the said case.

Per contra, learned Additional Public Prosecutor for the 1st respondent-State would submit that the evidence on record produced by the police along with the charge-sheet in proof of the offence under Section 494 IPC cannot be subjected to any judicial scrutiny at this stage at the time of framing charges and the Court cannot appreciate the evidence at the time of framing charges by holding a mini trial by marshalling the evidence on record. He would submit that the evidence on record – both oral and documentary – *prima facie* show that accused Nos.1 and 2 lived together as husband and wife and that accused No.2 has also shown accused No.1 as her husband in her Service Register and also in Aadhar Card and hospital record and her neighbours also testified to the fact that accused No.1 used to visit her house and that they used to live as husband and wife and accused No.1 is the husband of accused No.2 and the said evidence is sufficient to *prima facie* hold that accused No.1 married accused No.2 while his marriage with the deceased Vishali was subsisting and thereby both accused Nos.1 and 2 have committed the offence of bigamy punishable under Section 494 IPC. So, there is sufficient material on record to frame charge against accused No.2 also for the offence punishable under Section 494 IPC and as such, it cannot be said

that the charge that would be framed against accused No.2 for the offence punishable under Section 494 IPC would be wholly groundless. He would submit that the trial Court is fully justified in framing the charge against the petitioner for the offence punishable under Section 494 IPC and in dismissing the petition filed by her seeking discharge from the said case. Therefore, while strongly supporting the impugned order, learned Additional Public Prosecutor would pray for dismissal of the Criminal Revision Case.

From the aforesaid rival contentions of both the parties, the points that emerge for determination in this Criminal Revision Case are: (1) Whether there was a second marriage between accused No.1 and accused No.2 performed during the subsistence of the marriage of accused No.1 with the deceased Vishali? If so, whether there is valid legal evidence to establish that the said second marriage was performed while observing the essential ceremonies of a valid marriage to prove the offence of bigamy punishable under Section 494 IPC?

(2) Whether the Court can take cognizance of the case for the offence punishable under Section 494 IPC on the police report/charge-sheet filed by the Police under Section 173(2) Cr.P.C. in view of the specific bar engrafted under Section 198 Cr.P.C. on

the Court to take cognizance of the case only upon a complaint filed by the aggrieved person?

These are the two principal grounds on which the revision petitioner assails the order taking cognizance of the case against her for the offence punishable under Section 494 IPC and in dismissing her petition filed to discharge her from the case under Section 227 Cr.P.C. Thus, the contention of the revision petitioner assailing the impugned order is twofold as detailed supra.

POINT NO.1:

Before proceeding to examine the facts of the present case to answer the above two points and to resolve the controversy involved in this revision case, it may be apposite to note the ambit and scope of the power of Court under Section 227 and 228 Cr.P.C. in considering and disposing of the discharge applications. The Apex Court had an occasion to consider the scope of power of Court under Section 227 Cr.P.C. in the case of **Union of India v. Prafulla Kumar Samal** and held in para.7 as under:

> "If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for

proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

The words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really his function after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him."

In **Sajjan Kumar v. C.B.I.** again the Apex Court while considering the scope of power of the Court under Sections 227 and 228 Cr.P.C., held at para. 21 of the judgment as follows:

"(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly

explained, the Court will be fully justified in framing a charge and proceeding with the trial.

iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

Thus from the law elucidated by the Apex Court, while considering a plea for discharge of the accused under Section 227 Cr.P.C. in Sessions Case, the legal position is made very clear that even though the Court cannot subject the evidence on record produced along with the charge-sheet to judicial scrutiny and undertake an exercise of appreciation of evidence by holding a mini trial by marshalling the evidence on record, undoubtedly, the Court is under legal obligation to sift and weigh the evidence on record for the limited purpose of finding out whether or not a *prima facie* case is made out against the accused and whether or not there is sufficient ground for proceeding against the accused to frame a charge against him and to try him for the said offence or not. The Court can sift the evidence and weigh the same for that limited purpose. It is also clear from the dictum laid down in the aforesaid judgments that the Judge cannot act merely as a post office at the behest of the prosecution and frame the charge, but he has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution or not. For that limited purpose, the Court can sift and weigh the evidence.

Bearing in mind the aforesaid well settled principles of law relating to plea of discharge, the present case on hand has to be considered. As already noticed supra, the contention of the revision petitioner, while seeking discharge from the case, is twofold. The first contention is that the factum of the second marriage as alleged by the prosecution between accused Nos.1 and 2 is to be proved like any other fact and it is to be further established that the said second marriage was solemnized by observing the essential ceremonies required of a valid marriage, to hold that there was an offence of bigamy punishable under Section 494 IPC.

I would first like to deal with this primary contention of the revision petitioner. Before adverting to the same, it is apt to consider Section 5 of the Hindu Marriage Act, which contains essential conditions of a Hindu marriage, Section 7 which deals with ceremonies of a Hindu marriage and Section 17 which makes a marriage between two Hindus solemnized is void if at the date of such marriage either party had a husband or wife living and making the said second marriage an offence of bigamy punishable under Section 494 IPC.

As per Section 5 of the Hindu Marriage Act, a marriage may be solemnized between any two Hindus, if the conditions laid down in the said Section are fulfilled. About five conditions are enumerated therein to make a marriage between two Hindus a valid marriage. We are only concerned with the first condition which is relevant in the present context relating to a bigamous marriage. The first condition reads as follows:

> "**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)....
>
> (iii)....
>
> (iv)....
>
> (v)...."

Therefore, it is evident that if a party to the marriage has a spouse living at the time of marriage, the said marriage cannot be held to be a valid marriage. This Section 5 has to be read with Section 17. Section 17 says that any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or a wife living. So, the second marriage performed or solemnized while the party to the said marriage had a husband or a wife living at that time, would not only be void under Section 17 of the Hindu Marriage Act, but

also attracts the provisions of Sections 494 and 495 IPC punishable for commission of the offence of bigamy. Section 7 deals with ceremonies to be observed at the time of solemnization of a Hindu marriage. It says that a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto and clause (2) thereof says that where such rites and ceremonies include the *Saptapadi*, the marriage becomes complete and binding when the 7th step is taken. This Section 7 assumes significance in the context which says that a Hindu marriage is to be solemnized in accordance with the customary rites and ceremonies of either party thereto. So, a Hindu marriage to be valid has to be solemnized in accordance with the customary rites and ceremonies of either party thereto. As per the settled law, even to prove a second marriage between two Hindus to prosecute them for the offence of bigamy punishable under Section 494 IPC, it shall be proved that the second marriage is also solemnized in accordance with the customary rites and ceremonies of either party thereto. In other words, both the marriages i.e. the first marriage and the second marriage must be valid marriages and must be proved that the second marriage was also performed or solemnized in accordance with the customary rites and ceremonies.

A three-Judge Bench of the Supreme Court in the case of **Bhaurao Shankar Lokhande v. State of Maharashtra** held that the marriage between two Hindus is void in view of Section 17, if two conditions are satisfied: (i) the marriage is solemnized after the commencement of the Act; (ii) at the date of such marriage, either party had a spouse living. It is further held that the word 'solemnize' means, in connection with a marriage, "**to celebrate the marriage with proper ceremonies and in due form"**, according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is "celebrated or performed with proper ceremonies and due form", it cannot be said to be 'solemnized'. It is therefore, essential, for the purpose of Section 17 of the Act, that the marriage to which Section 494 IPC applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make them ceremonies prescribed by law or approved by any established custom. It is further held at para.5 of the said judgement as follows:

> "We are of opinion that unless the marriage which took place between appellant No. 1 and Kamlabai in February 1962 was performed in accordance with the requirements of the law applicable to a marriage

between the parties, the marriage cannot be said to have been 'solemnized' and therefore appellant No.1 cannot be held to have committed the offence under Section 494 IPC."

At para.12 of the said judgment it is held as follows:

"We are therefore of the opinion that the prosecution has failed to establish that the marriage between appellant No.1 and Kamlabai in February, 1962 was performed **in accordance with the customary rites as required by Section 7 of the Act**. It was certainly not performed "in accordance with the essential requirements for a valid marriage under Hindu law. It follows therefore that the marriage between appellant No.1 and Kamlabai does not come within the expression "solemnized marriage" occurring in Section 17 of the Act and consequently does not come within the mischief of Section 494 IPC even though the first wife of appellant No.1 was living when he married Kamlabai in February, 1962."

In another judgment in the case of **A. Subash Babu v. State of A.P.**, the Supreme Court held that to prove an offence of bigamy punishable under Section 494 IPC, it is essential to prove that the second marriage was performed while observing all essential ceremonies of a marriage.

Yet in another judgment in the case of **Gopal Lal v. State of Rajasthan** the Supreme Court again held that in order to attract the provisions of Section 494 IPC, both the marriages of accused must be valid in the sense that the necessary ceremonies required by the personal law must have been duly performed. The Apex Court further held that the essential ingredients of the offence

under Section 494 IPC are (i) that the accused spouse must have contracted the first marriage; (ii) that while the first marriage was subsisting the spouse concerned must have contracted a second marriage; and (iii) that the second marriage was valid one in the sense that necessary ceremonies required by law or by custom had been actually performed.

The Division Bench of our A.P. High Court also in the case of **Padullaparthi Mutyala Paradeshi v. Padullaparthi Subbalakshmi** held at para.18 as follows:

> "18. Before proceeding to consider whether the proof in respect of a, second marriage is different from that concerning the first marriage, we would set down the propositions deducible from the above discussion:
> (1) A marriage cannot be proved merely by statements which relate to the existence of any relationship or by the opinion of any person given out or even expressed by conduct as to the existence of such relationship of any person although that person has special means of knowledge on the subject; or
> 2. by the admissions made by the parties to the marriage who may at times be actuated by ulterior motives; but if, in addition thereto or independently, any evidence of the parents of the parties regarding celebration or solemnization of a marriage is available it would go a long way in establishing the factum of marriage.
> 3.....
> 4.....
> 5.....
> 6....."

Thus, from the exposition of law made in the aforesaid judgments, the legal position is manifest that in order to prove an offence of bigamy under Section 494 IPC, firstly, the factum of the second marriage has to be established and proved like any other fact with acceptable legal evidence; secondly, it has to be proved that the said second marriage was solemnized in due form as per the custom and ceremonies prevailing in the said community; and thirdly, it has to be proved that both i.e. the first marriage and the second marriage are valid marriages solemnized as per the ceremonies prevailing in the community.

If the second marriage is proved to be solemnized as per the ceremonies prevailing in the community and if it is found to be a valid marriage, then Section 17 of the Hindu Marriage Act makes the said second marriage void which took place during the life time of the spouse of one of the parties to the said marriage and it also makes the said second marriage an offence punishable under Section 494 IPC.

Therefore, it is to be now ascertained from the facts of the prosecution case and the evidence that was collected by the prosecution and produced along with the charge-sheet, whether there is any *prima facie* evidence to establish the factum of the

second marriage i.e. that the second marriage has in fact taken place. If so, whether it was solemnized in due form as per the ceremonies prevailing in the said community to hold that it is a valid marriage or not, and whether any offence of bigamy punishable under Section 494 IPC was committed or not.

This Court has meticulously gone through the contents of the entire charge-sheet and the statements of the witnesses produced along with the charge-sheet and the documentary evidence produced by the prosecution along with the charge-sheet to ascertain whether there is evidence in proof of the factum of the second marriage or not i.e. whether the second marriage was in fact solemnized or not and also to ascertain if it was solemnized, whether it was solemnized as per the ceremonies prevailing in the caste custom as required under Section 7 of the Hindu Marriage Act to find out whether it is a valid marriage or not.

A reading of the charge-sheet shows that it absolutely devoid of any evidence in proof of factum of the alleged second marriage. The prosecution did not at all collect evidence as to when the said second marriage between accused Nos.1 and 2 took place and where it took place and how it was performed and what is the form of marriage and what are the ceremonies that are observed in

solemnizing the said marriage. Since these are the essential requirements and ingredients required to prove an offence of bigamy punishable under Section 494 IPC, as per the law laid down by the Apex Court in the above cited judgments, the prosecution has to invariably establish the said facts and place *prima facie* evidence to establish the same even for the purpose of framing charge to that effect against the accused to try them for the said offence. There is absolutely no evidence produced by the prosecution in proof of the factum of the second marriage. No evidence is produced to show that second marriage was in fact solemnized. So also no evidence was produced to show that the second marriage was solemnized by observing the essential ceremonies prevailing in the said community to hold that it was also a valid marriage like the first marriage as required under law. Evidence is totally lacking in respect of these material particulars. Therefore, this court has no hesitation to hold that there is no *prima facie* evidence much less an iota of evidence on record in proof of the factum of the second marriage and also in proof of the essential ceremonies said to have been observed in solemnization of the second marriage.

The prosecution merely relied on the oral evidence of LWs.13 and 14, who are the tenants living as neighbours of accused No.2 at her house, who stated that accused No.1 used to come to the house of accused No.2 and that they used to live as husband and wife and that accused No.1 is the husband of accused No.2 and that they begot children. The prosecution further relied on the documentary evidence in the form of Service Register of accused No.2, who is working as Teacher, and the Aadhar Card and her hospital record, wherein accused No.1 was shown as the husband of accused No.2. So, this is the only oral and documentary evidence that was produced and relied on by the prosecution to show that accused No.1 married accused No.2 while his marriage with his first wife Vishali was subsisting. It is sought to be contended on behalf of the prosecution that this evidence *prima facie* raises suspicion atleast that accused No.1 married accused No.2 and committed an offence of bigamy punishable under Section 494 IPC and it is sufficient to try accused No.2 for the said offence by framing a charge to that effect against her. The said contention is legally unsustainable. Now the law is very well settled that the factum of second marriage i.e. that the second marriage has in fact taken place and that it was solemnized as per the essential

ceremonies prevailing in the community has to be independently proved like any other fact with acceptable legal evidence. Even admission of a second marriage by the party to the said second marriage is not sufficient and valid evidence to hold that there was a bigamous marriage.

The three-Judge Bench judgment of the Apex Court in **Kanwal Ram v. Himachal Pradesh Administration** held at para.7 of the judgment as follows:

> ".....Now the statement admitting the second marriage by these persons is certainly not evidence of 'the marriage so far as Kanwal Ram and Seesia are concerned; they did not make it. Nor do we think, it is evidence of the marriage even against Kubja....."

It is further held:

> "....Secondly, it is clear that in law such admission is not evidence of the fact of the second marriage having, taken place. In a bigamy case, the second marriage as a fact, that is to say, the ceremonies constituting it, must be proved..."

In arriving at the said conclusion, the three-Judge Bench of the Supreme Court relied on the cases of **Empress v. Pitambur** Singh; **Empress v. Kallu** and **Morris v. Miller** wherein it has been held that admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case.

The Supreme Court has also considered the case of **Bhaurao Shankar Lokhande**[3] wherein the Supreme Court earlier held that a marriage is not proved unless the essential ceremonies required in the solemnization are proved to have been performed.

The Division Bench of the Andhra Pradesh High Court in **Padullaparthi Mutyala Paradeshi**[6] also held at para.18 as follows:

> "...(1) A marriage cannot be proved merely by statements which relate to the existence of any relationship or by the opinion of any person given out or even expressed by conduct as to the existence of such relationship of any person although that person has special means of knowledge on the subject;"

Therefore, in the instant case, a mere mention of the name of accused No.1 as the husband of accused No.2 in her Service Register, Aadhar card, and hospital record etc., which may be an admission made by accused No.2, that accused No.1 is her husband, is not a valid evidence under law in proof of the factum of marriage between both of them that a second marriage was solemnized between both of them in the absence of any other valid legal evidence to that effect. If the factum of the second marriage between both of them is independently proved and established then this documentary evidence may be a corroborative piece of evidence to that evidence. In the absence of any independent legal evidence in proof of the factum of the second marriage, these documents in

the form of Service Register of accused No.2, her Aadhar card and hospital record by themselves cannot be a valid legal evidence in proof of factum of a second marriage, in view of the above law laid down by the Apex Court and our A.P. High Court.

Even the oral evidence in the form of testimony of LWs.13 and 14, who are the neighbours of accused No.2, which is only an opinion evidence under Section 50 of the Evidence Act that as accused Nos.1 and 2 are living together and that they are in cohabitation with each other and that they begot children and that they are treated as husband and wife in their estimation that by itself also cannot be construed as a valid evidence to prove that there was any second marriage between accused Nos.1 and 2. This evidence of LWs.13 and 14 also will not establish the factum of second marriage i.e. the second marriage has in fact taken place between both accused Nos.1 and 2. As per purport of the Judgment of the Division Bench of the A.P. High Court in the above case of **Padullaparthi Mutyala Paradeshi**[6], by mere statements which relate to the existence of any relationship or by the opinion of any person given out or even expressed by conduct as to the existence of such relationship of any person although that person

has special means of knowledge on the subject, a second marriage cannot be proved.

In fact Section 50 of the Evidence Act reads as under:

> "**50. Opinion on relationship, when relevant**.—When the Court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:
>
> Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under Sections 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860)."

A reading of the aforesaid Section shows that an opinion as to the relationship of one person to another, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact.

Although the evidence of LWs.13 and 14, who are neighbours of accused No.2, who may have special means of knowledge relating to the relationship between accused Nos.1 and 2, who are in a live-in relationship is a relevant fact and evidence, the proviso to Section 50 of the Evidence Act makes it very clear that such opinion of the witnesses shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 or in

prosecutions under Sections 494, 495, 497 or 498 of IPC. Therefore, the evidence of LWs.13 and 14 is clearly inadmissible in evidence in proof of the factum of the second marriage between accused Nos.1 and 2 as per the proviso to Section 50 of the Evidence Act.

Barring the said evidence of LWs.13 and 14, and the documentary evidence in the form of Service Register, Aadhar Card and hospital record of accused No.2 which is found to be not sufficient to establish that a second marriage between accused Nos.1 and 2 has in fact taken place, there is absolutely no other acceptable legal evidence on record to prove that any bigamous marriage as required under Section 494 IPC and Section 17 of the Hindu Marriage Act was solemnized between accused Nos.1 and 2. It is already noticed supra that for the limited purpose of ascertaining whether there is sufficient ground to proceed against the accused to try the accused for the offence, the Court can weigh and sift the evidence and if the evidence relied on by the prosecution is weighed and sifted for the said limited purpose, as discussed supra, the said evidence is absolutely not sufficient to hold that there is sufficient ground to proceed against the

petitioner, who is accused No.2, to try her for the said offence of bigamy punishable under Section 494 IPC.

To sum up, the settled legal position emanating from the law enunciated in all the above cited judicial precedents of the Apex Court and also the High Court can be summarized as follows:

In order to prove an offence of bigamy under Section 494 IPC, the prosecution has to first prove the factum of second marriage i.e. that the second marriage has in fact taken place and then it must establish that the second marriage is a valid marriage solemnized in due form with proper ceremonies prevailing in the community of the parties to the marriage. Then the second marriage so solemnized during the subsistence of the first marriage would become void under Section 17 of the Hindu Marriage Act. It also affords a ground to prosecute the persons who contracted the second marriage during the subsistence of the first marriage for the offence of bigamy punishable under Section 494 IPC. If the prosecution fails to prove the factum of second marriage, the question of it becoming void or the question of prosecuting any person for bigamy under Section 494 IPC does not arise at all. Even if the factum of second marriage is proved, if it is not proved that it was solemnized in due form as per the ceremonies prevailing

in the community, then also there would be no valid marriage and the question of it becoming void or the question of prosecuting any person for the offence of bigamy does not arise. In such case prosecution under Section 494 of IPC is not maintainable. Mere producing some evidence to prove or show that the accused is in cohabitation or in live-in relationship with another woman during the subsistence of his first marriage without proving that he has in fact contracted the second marriage and thereby living with her, by itself do not constitute any offence of bigamy under Section 494 IPC.

Therefore, the point is answered accordingly and affirmatively in favour of the revision petitioner.

POINT NO.2:

The second ground of attack of the revision petitioner is that the Court cannot take cognizance of the case for the offence punishable under Section 494 IPC unless a complaint is filed by the aggrieved party before the concerned Court as per the mandate of Section 198 Cr.P.C. Therefore, taking cognizance of the case in the instant case for the offence punishable under Section 494 IPC on the basis of the final report/charge-sheet filed by the police contrary to the bar contained in Section 198 Cr.P.C. is bad in law

and it cannot be sustained. I find considerable force in the said contention of the learned senior counsel.

As can be seen from Section 198 Cr.P.C., it mandates that no Court shall take cognizance of an offence punishable under Chapter-XX of the Indian Penal Code except upon a complaint made by some person aggrieved by the offence. As per its proviso, if the said aggrieved person is under the age of eighteen years or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf; and where the person aggrieved by an offence punishable under Sections 494 and 495 IPC is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother' s brother or sister, or, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

Therefore, it is clear from Section 198 Cr.P.C. that a bar is imposed on the Court to take cognizance of an offence punishable under Section 494 IPC. It can take cognizance of the case only on a complaint made by aggrieved party or any of her relatives

mentioned in clause (c) of the proviso, or by any other person with the leave of the Court. It does not contemplate taking cognizance of the case on a police report/charge-sheet filed by the Police under Section 173(2) Cr.P.C.

Earlier the offence punishable under Section 494 IPC is a non-cognizable offence. The Legislative Assembly of the State of Andhra Pradesh by way of Andhra Pradesh Second Amendment Act 3 of 1992, amended the first schedule to Central Act 2 of 1974 i.e. the Code of Criminal Procedure, 1973 and made the offence under Section 494 IPC a 'cognizable' offence and a 'non-bailable' offence. The said Andhra Pradesh Second Amendment Act 3 of 1992 was reserved by the Governor of Andhra Pradesh on the 21.10.1991 for consideration and assent of the President. The Presidential assent was received on 10.02.1992 and the amendment was published on 15.02.1992 in the Andhra Pradesh Gazette Part IV-B (Ext.). Therefore, with effect from 15.02.1992 undoubtedly the offences punishable under Sections 494 and 495 IPC are cognizable offences in the State of Andhra Pradesh. So, the police officer can now register the case under Section 154 Cr.P.C. and can investigate the same under Section 156 Cr.P.C. The bar engrafted under Section 198(1) Cr.P.C. to take cognizance of the case under Section 494 IPC

is on the Court and not on the police. So, in view of the fact that it is a cognizable offence, police can register the case on a report lodged with them to that effect and also investigate the case and file final report under Section 173(2) Cr.P.C. Now, the crucial question that arises for consideration is, whether Court can take cognizance of the case on such police report/charge-sheet filed by the police or not in view of the express bar engrafted under Section 198(1) Cr.P.C. on the Court to take cognizance of the case except upon a complaint filed by the aggrieved party before it.

"Complaint" is defined under Section 2(d) Cr.P.C and it reads thus:

> " 'Complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.
>
> Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

Therefore, as per the definition of complaint under Section 2(d) Cr.P.C., any oral or written allegation that some person whether known or unknown has committed an offence made to a Magistrate to take action under the Code is a complaint and police report filed under Section 173(2) Cr.P.C. is specifically excluded

from its purview. Section 2(r) Cr.P.C. defines "police report" which means a report forwarded by a police officer to Magistrate under sub-section (2) of Section 173, which is generally termed as charge-sheet. So, only when an allegation relating to the offence under Section 494 IPC is made by the aggrieved person to the Magistrate, then only the Court can take cognizance of the case. Certainly the Court cannot take cognizance of the case for the offence punishable under Section 494 IPC on a police report/charge-sheet filed by the police. Eventhough offence under Section 494 IPC is made "cognizable" offence as per amendment Act 3 of 1992, there is no corresponding amendment made to Section 198 Cr.P.C. Therefore, the bar under Section 198 Cr.P.C. still subsists. The legal position in this regard is not *res nova* and it has been clearly well settled.

The Division Bench of the Andhra Pradesh High Court in the case of **S. Radhika Sameena v. The S.H.O., Habeebnagar P.S**. held at para.15 as follows:

> "15. We have considered the aspect whether straightway we should direct the Mahila Court (XXII Metropolitan Magistrate's Court, Hyderabad), whose jurisdiction covers matrimonial offences, to take cognizance of the offence under Section 494 IPC on the basis of the reply-affidavit filed by the petitioner. But the law, as we comprehend it to be, does not seem to permit such a course of action in view of the specific language of Section 198(1) of the Code of Criminal Procedure, under which, the complaint to the Court, competent to take cognizance of

offences punishable under Chapter XX of the Indian Penal Code - of which Section 494 constitutes a part - should only be by "some person aggrieved by the offence" and the exceptions to this incorporated in proviso (c) to sub-section (1) exclude the complaint by anyone else including a court, even a higher Court. At any rate, there appears to be no judicial precedent in this regard. We, therefore, hold that it is open to the petitioner to file a complaint before the Mahila Court (XXII Metropolitan Magistrate, Hyderabad) and if such a complaint is filed, the Mahila Court shall take cognizance of the same and dispose it of in accordance with law and in the light of this judgment as expeditiously as possible in any event not later than six months from the date of receipt of the complaint."

While considering analogous provision relating to bar created in taking cognizance of case except on a complaint by an authorised officer under the Mines and Minerals (Development and Regulation) Act, 1957, the Division Bench of the Madurai Bench of Madras High Court, in **Sengol Charles and K Kannan v. State** also held that when any such bar is created for taking cognizance of a case, the Court cannot take cognizance of the case except on a complaint by the concerned.

It was a case arising out of the Mines and Minerals (Development and Regulation) Act, 1957. As per the facts of the said case, the accused committed theft of sand from rivers and riverbeds belonging to the Government. The said act also constitutes violation of the provisions of the Mines and Minerals

(Development and Regulation) Act. So, the act committed by the accused constitute offences both under Section 379 IPC for committing theft of sand and also an offence punishable under Section 21 of the Mines and Minerals (Development and Regulation) Act, for illegal excavation of the sand unauthorisedly. Police registered a case for the offence under Section 379 IPC and also under Section 21 of the Mines and Minerals (Development and Regulation) Act and filed its final report after investigation. Since Section 22 of the Mines and Minerals (Development and Regulation) Act says that no Court shall take cognizance of any offence punishable under the said Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government, it is sought to be contended on behalf of the accused that taking cognizance of the case by the Court on the basis of the final report filed by the Police for the offence under Section 21 of the Mines and Minerals (Development and Regulation) Act is bad in law and sought quash of the final report. After elaborately discussing with the issue, the Division Bench of Madurai Bench of Madras High Court ultimately answered the reference made to it holding as follows:

"If an act of the accused constitutes offences under Indian Penal Code as well as the provisions of the Mines and Minerals [Development and Regulation] Act, the registration of a case both under the provisions of Indian Penal Code and the Mines and Minerals [Development and Regulation] Act is not illegal and the police may proceed with the investigation. However, the police shall file a police report only in respect of the offences punishable under the Indian Penal Code and in respect of the offences punishable under the Mines and Minerals [Development and Regulation] Act, he may file a separate complaint, provided he has been authorised under Section 22 of the said Act.

In any event, if the police officer, files a final report in respect of offences under IPC as well as under Section 21 of the Mines and Minerals [Development and Regulation] Act, the Magistrate may take cognizance of the offences under IPC alone and proceed with the trial.

In respect of offences under the Mines and Minerals (Development and Regulation) Act, the court shall take cognizance only on a complaint filed by a person authorised in that behalf by the Central Government or State Government and not on a police report."

In the above case also since the offence under Section 21 of the Mines and Minerals (Development and Regulation) Act, 1957 is cognizable offence, it is held that it is lawful for the police officer to register a case as provided under Section 154 Cr.P.C. and investigate the same as per the provisions of the Code. But, the difficulty arises only in the matter of taking cognizance as Section 22 of the said Act prohibits being taken except upon a complaint filed by a person authorised by the Central Government or the State Government.

The ratio laid down in the aforesaid judgment of the Division Bench of Madurai Bench of the Madras High Court, in my considered view, squarely applies to the present facts of the case.

In a similar case relating to theft of sand committed by the accused, the offence under Section 21 of the Mines and Minerals (Development and Regulation) Act, 1957, which came up for consideration before the Apex Court also in the case of **State (NCT of Delhi) v. Sanjay**, the Apex Court has also taken similar view.

Therefore, in the instant case, as there was no complaint filed before the court by the aggrieved person, who is no more or even by any of the persons on her behalf as contemplated under clause (c) of the proviso to Section 198 Cr.P.C. before the Court, cognizance of the case for the offence punishable under Section 494 IPC cannot be taken by the Court in view of the express bar engrafted in Section 198(1) Cr.P.C. to take cognizance of the said case. Therefore, taking cognizance of the case in the instant case for the offence punishable under Section 494 IPC is also legally unsustainable. Even on that ground, the petitioner, who is accused No.2, cannot be charged for the offence punishable under Section 494 IPC and tried for the said offence by the Sessions

Court, Kurnool. This point is also answered affirmatively in favour of the revision petitioner.

The learned Sessions Judge did not at all consider the law relating to proof of offence of bigamy punishable under Section 494 IPC and did not make any attempt to ascertain whether there is atleast *prima facie* legal evidence on record produced by the prosecution to hold that there is "sufficient ground for proceeding against accused No.2, for the offence punishable under Section 494 IPC or not". The entire order is silent in this regard. In fact, the learned Sessions Judge totally misdirected himself in considering the petition under Section 227 Cr.P.C. and in appreciating the contentions raised in the said petition. The learned Sessions Judge did not make any attempt to *prima facie* ascertain by considering the evidence on record whether it is sufficient to try accused No.2 for the said offence and whether there is sufficient ground to proceed further against her in this regard or not. The bar contained under Section 198 Cr.P.C. is also not dealt with in the impugned order. Therefore, the impugned order is clearly unsustainable under law and it warrants interference in this Criminal Revision Case and the same is liable to be set aside.

The case is only dealt with regarding the offence punishable under Section 494 IPC against accused No.2. As per the evidence relied on by the prosecution no offence of bigamy is constituted to try accused No.2 for the offence punishable under Section 494 IPC though the said evidence is sufficient to establish cohabitation between accused Nos.1 and 2 which according to the prosecution is the motive for doing away with the life of the deceased-Vishali by accused No.1. Therefore, while considering the case against accused No.1, the trial Court shall not be swayed away by any of the observations or findings made by this Court in this Criminal Revision Case. The trial Court without being influenced by any of these observations and findings shall independently deal with the case against accused No.1 for the offences with which he is charged according to law and dispose of the said Sessions Case.

In fine, the Criminal Revision Case is allowed. The impugned order is set aside. The petition filed under Section 227 Cr.P.C. by accused No.2 in Crl.M.P.No.89 of 2019 in Sessions Case No.63 of 2018 on the file of the Sessions Judge, Kurnool, is allowed. Accused No.2 stands discharged from the case.

Consequently, miscellaneous applications, pending if any, shall also stand closed.

JUSTICE CHEEKATI MANAVENDRANATH ROY

Date:07-05-2020.

Note:
L.R. copy to be marked.
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