Priya Bala Ghosh vs Suresh Chandra Ghosh on 4 March, 1971

Equivalent citations: 1971 AIR 1153, 1971 SCR (3) 961, AIR 1971 SUPREME COURT 1153, 1973 MADLJ(CRI) 747, (1971) 2 SC CRI R 513, 1972 MADLW (CRI) 275, 1973 2 SCJ 611, 1974 ALLCRIR 45, 1971 SCD 439, 1971 3 SCR 961, 1971 CURLJ 496, 1971 CRI APP R (SC) 329

Author: C.A. Vaidyialingam

Bench: C.A. Vaidyialingam, A.N. Ray

PETITIONER:
PRIYA BALA GHOSH

Vs.

RESPONDENT:
SURESH CHANDRA GHOSH

DATE OF JUDGMENT04/03/1971

BENCH:
VAIDYIALINGAM, C.A.
BENCH:
VAIDYIALINGAM, C.A.
RAY, A.N.

CITATION:
1971 AIR 1153 1971 SCR (3) 961
1971 SCC (1) 864
CITATOR INFO :
R 1979 SC 713 (6)

ACT:
Penal Code (Act 45 of 1860), s. 494-Proof of second marriage-Admission of second marriage-Relevancy.

HEADNOTE:
The appellant filed a complaint against her husband the respondent, stating that he took a second wife during the subsistence of the appellant's marriage and that the respondent was therefore guilty of an offence 'under s. 494 I.P.C. The trial court convicted the respondent. In appeal, the Sessions Court found, that in relation to the second marriage, there was no evidence of the performance of Homo and Saptapadi, which were essential rites to be performed

for solemn-isation of a marriage according to the law prevailing among the parties; and the respondent was acquitted. In the High Court, in order to prove the second marriage, the appellant sought to rely upon a statement made by the respondent in answer to an earlier complaint under s. 494 I.P.C., filed by-the appellant, wherein the respondent had admitted that he had married a second wife because of the misconduct of the appellant. The High Court, however, held that the statement could not be relied upon for proving that the essential ceremonies had been performed and confirmed the,acquittal of the respondent.

In appeal to this Court,

HELD (1) The prosecution has. to prove that the alleged second marriage, was a valid marriage, duly performed in accordance with the essential religious rites applicable according to the law and custom of the parties. [967 E]

(2) The statement in the earlier proceedings in relation to the complaint under s. 494 I.P.C., could not be relied upon because : (although strictly it was not a confession never theless, if acted upon it would tend to incriminate the respondent (who was in the position of an accused) and therefore he was entitled to be given an opportunity of offering his explanation, if any, in respect of such incriminating statement; (b) such opportunity was not given to the respondent and it was not put to him when he was examined under s. 342 Cr.P.C. and (c) such an admission cannot in law be treated as evidence of the 'second marriage having taken place in a bigamy case. [969 D-H]

(3) In the present case, both the Sessions Judge and the High Court have found that there was no evidence that Homo and Saptapadi, which are essential rites for a marriage according to law governing the parties, had been performed when the respondent is said to have married a second wife, and hence the respondent was not guilty. [964 C; 970 B-C]

Bhaurao Shankar Lokhande v. State Of Maharashtra, [1965] 2 S.C.R. 837 and Kanwal Ram v, Himachal Pradesh Admn, [1966] 1 S.C.R. 539, followed.

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JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 275 of 1968.

Appeal by special leave from the judgment and order dated January 19, 1968 of the Calcutta High Court in Criminal Appeal No. 393 of 1966.

S. C. Majumdarand R. K. Jain, for the appellant. The respondent did not appear.

The Judgment of the Court was delivered by Vaidialing, J. In this appeal, by special leave, the appellant challenges the judgment and order of the, Calcutta High Court dated January 19, 1968 in Criminal Appeal No. 393 of 1966.

The appellant filed a complaint dated April 11, 1963 against the respondent, her husband, in the Court of the Magistrate, 1st Class, Alipurduar, alleging that he has committed an offence under S. 494 of the Indian Penal Code. Briefly her case was as follows :

> The respondent had married the appellant in or about 1948 according to Hindu rites and both of them had lived as husband and wife, together. But some time before the date of the complaint the respondent began to ill treat her, with the result that she had to reside with her mother and brother. The respondent illegally married one Sandhya Rani as his second wife on May 3 1, 1962 and they have been living together as husband and wife. As the second marriage has taken place during the subsistence of the appellant's marriage with the respondent, the second marriage is invalid in law and the respondent is guilty of an offence under S.494 of the Indian Penal Code.
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> The respondent pleaded not guilty of the' offence alleged against him. He further pleaded that he has never married the appellant and that the entire prosecution case is false. The trial Magistrate after considering the evidence adduced both regarding the marriage between the appellant and the respondent as well as the alleged second marriage between- the respondent and Sandhya Rani, held that the marriage of the appellant with the respondent was established. Notwithstanding the scantiness of the evidence regarding the second marriage, the Trial Magistrate, however, found that the respondent had admitted the second marriage in his objections filed to a claim made by the appellant for maintenance under S. 488 of the Code of Crimi-
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> nal Procedure. In this view the Magistrate held that there cannot be any doubt that the respondent has married Sandhya Rani while his first wife, the appellant, was still alive. the Magistrate further held that as the marriage with the appellant was subsisting, the second marriage is void under s. 17 of the Hindu Marria Act, 1955 (Act 25 of 1955), (hereinafter to be referred as the Act) and, therefore, the respondent was guilty of the offence under s. 494 of the Indian. Penal Code. The respondent was sentenced for the said offence to undergo rigorous imprisonment for one year and also to pay a fine of Rs. 5001- and in default to suffer rigorous imprisonment for a further period of three months. A further direction was given that half the fine, if realised, was to be paid to the complaint, the appellant. On appeal by the respondent, the learned Sessions Judge, Jalpaiguri, by his judgment dated April 30 1966 held that the evidence does not establish that the essential ceremonies to constitute a valid marriage have been performed either in the case of the marriage claimed to have taken place between the appellant and the- respondent or in respect of the alleged second marriage with Sandhya Rani. In this view the learned Sessions Judge set aside the order of the magistrate convicting the respondent and sentencing him as mentioned above. The respondent was acquitted of the offence under s. 494 I.P.C.

On appeal by the appellant, the Calcutta High Court, how- ever,, differed from the finding of the, learned Sessions Judge regarding the invalidity of the marriage between the appellant and the respondent. On the other hand, the High Court held that the evidence establishes that a valid marriage, according to Hindu law, by which the parties were governed, has taken place between the appellant and the respondent. But regarding the second marriage, the High Court agreed with the finding of the learned Sessions Judge that the essential ceremonies' to constitute a valid marriage have not been proved to have taken place. In this view the High Court confirmed the order of acquittal passed in favour of the respondent and dismissed, the appellant's appeal.

Mr. S. C. Majumdar, learned counsel for the appellant, has raised two contentions before us I that the view of the High Court that the essential ceremonies to constitute a valid marriage have not been proved to have taken place regarding the second. marriage of the respondent with Sandhya Rani, is erroneous and contrary to the evidence adduced in the case and (2) In any event in view of the specific admission made by the respondent in Ex. 2 about the second marriage and having due regard to the other surrounding circumstances, it must be held that the respon- dent is guilty of the offence, under s. 494 I.P.C. The respondent has not appeared before us and we have to proceed on the basis of the finding of the learned Sessions Judge, accepted by the High Court, that the appellant was married to the respondent and that the marriage was subsisting on the date of the allied second marriage.

Both the contentions of the learned counsel for the appellant can be dealt with together. It has been pointed out by the learned Sessions Judge that both sides agreed that according to the law prevalent amongst the parties Homo and Saptapadi were, essential rites to be performed to constitute a valid marriage. Both sides also agreed before the Court that there was no specific evidence as to the performance of Saptapadi and Homo in the case of the alleged marriage of the respondent with Sandhya Rani. Therefore, the main question that has to. be considered is, whether the performance of the above ceremonies and rites have to be established by evidence specifically before the respondent could be convicted under s. 494 I.P.C. The findings of the High Court are that the Priest, P.W. 6, who claims to have officiated at the marriage of the respondent and Sandhya Rani has given evidence to the effect that the marriage was solemnised according to Hindu rites. He has not said anything more than this. The other evidence adduced has not been considered to be of any use in this regard. The further finding of the High Court is that no evidence was adduced that the Homo and Saptapadi were performed in the case of the marriage between Sandhya Rani and the respondent and that it has also not been proved that there was any custom prevalent amongst the parties that those essential ceremonies are not necessary for the purpose of solemnization of the marriage.

According to Mr. Majunidar, when once the priest has given evidence to the effect that the marriage between the respondent and Sandhya Rani has been performed, it

follows that all the essential ceremonies that are necessary to constitute a valid marriage must be presumed to have been performed. In any event, when there is evidence to show that the marriage as a fact has taken place, the presumption is that it has taken place according to law. In this connection Mr. Majumdar referred us to various English decisions when on the basis of certain evidence regarding the taking place of marriage between the, parties a presumption has been drawn that the marriage must have been solemnized according to law. In our opinion, it is unnecessary to refer to those cases cited by the learned counsel as the position is concluded against the appellant by the decisions of this Court on both points. Section 5 of the Act lays down conditions for a Hindu marriage' It will be seen that one of the conditions is that referred to in clause (i), namely, that neither of the parties 96 5 has a spouse living at the time of the marriage., Section 7 dealing with the ceremonies for Hindu marriage is as follows :

"Section 7-Ceremonies for a Hindu marriage. (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. (2) Where such rites and ceremonies include the Saptapadi that is, the taking of seven steps by the bridegroom and the bride jointly before the as red fire), the marriage becomes a complete and binding when the seventh step is taken."

We have ponited out that in the case before us both sides were agreed that according to the law prevalent amongst them Homo and saptapadi were essential rites to be performed for solemnities of the marriage and there is no specific evidence regarding the performance of these essential rites. The parties have also not proved that they are governed by any custom under which these essential ceremonies need not be performed.

Section 1 1 of the Act deals with void marriages. One of the conditions, if contravened, which makes a marriage solemnized after the commencement of the Act, null and void is if any party thereto have a spouse living at the time of the marriage.

Section 17 relating to punishment of bigamy is as follows "Section 17 Punishment of bigamy 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 Wife living; and the provisions of sections 494 and 495 of the Indian Penal Code shall apply accordingly."

Again in the case before us there is no controversy that the second marriage is stated to have taken place after the com- mencement of the Act during the subsistence of the first marriage. If the second marriage has taken place, it will be void under the circumstances and s. 494 of the Indian Penal Code will be attracted. Section 494 of the Indian Penal Code is as follows "Section 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 lift.- of such husband or wife, shall be punished with imprisonment of either descrip-

tion for a term which may extend to seven years, and shall also be liable to fine."

In Bhaurao Shankar Lokhande and another v. Slate of Maha- rashtra and another,(1) the question arose whether in a prosecution for bigamy under S. 494 I.P.C. it was necessary to establish that the second marriage had been duly performed in accordance with the essential religious rites applicable to the form of marriage gone through. The first appellant therein had been convicted for an offence under s. 494 I.P.C. for going through a marriage which was void by reason of its taking place during the life time of the previous wife. The said appellant contended that it was 'necessary for the prosecution to establish that the alleged second marriage had been duly performed in accordance with the essential religious rites. The State, on the other hand, contended that for the commission- of the offence under s. 494 I.P.C. it was not necessary that the second marriage should be a valid one and a person going through any form of marriage during the life time of the first wife would be guilty of the offence. This Court rejected the contention of the State and observed as follows :

> "Prima facie the expression 'whoever..... marries' must mean 'whoever .... marries validly' or whover ..... marries and whose marriage is a valid one.' If the marriage is not a valid one, according to, the law.
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> applicable to the parties, no question of its being void by reason of its taking place during the life time of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law."

Again in interpreting the word "solemnize" in S. 17 of the Act, it was stated :

> "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 S. 17 of the Act, that the marriage to which s. 494 I.P.C. applies on account of the provisions of the Act, should have been celebrated with Droper 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 precribed by law or approved by any established custom."

(1) [1965] 2 S.C.R. 837.

96 7 From the above quotations it is clear that if the alleged second marriage is not a valid one according to law applicable to the parties, it will not be void by reason of its taking place during the life of the husband or the wife of the person marrying so as to attract s. 494 I.P.C. Again in order to hold that the second marriage has been solemnized so as to attract s. 17 of the Act, it is essential that the second marriage should have been celebrated with proper ceremonies and-in due form. In the said decision this Court further considered the question whether it has been established that with respect to the alleged second marriage the essential ceremonies for valid marriage have been performed. After referring to the passage in Mulla's Hindu Law, 12th Edn. at page 615 dealing with the essential ceremonies which have to be performed for a valid marriage, this Court, on the evidence held that the prosecution had neither established that the essential ceremonies had been

performed nor that the performance of the essential cermon is had been abrogated by the custom goveming the community to which the parties belonged In this view it was held that the prosecution in that case had failed to establish that the alleged second marriage had been performed in accordance with the requirement of s. 7 of the Act. The effect of the decision, in our opinion, is that the prosecution has to prove tbat the alleged second marriage had been duly performed in accordance with the essential religious rites aplicable to the form of marriage gone through by the parties and that the said marriage must be a valid one according to law applicable to the parties. In Kanwwl Ram and others v. The Himachal Pradesh Admn. (1) ibis Court reiterated the principles, laid down is the earlier decision referred to above that in aprosecution for bigamy the second marriage has to be proved as a fact and it must also be Proved that the necessary ceremonies had been performed. Another Proposition laid down by this decision, which answers the second contention of the learned counsel for the appellant, is that admission of marriage by an accused is no evidence of marriage for the purrpose of proving, an offence of bieamv or adulterv. On the evidence it was held in the said decision that the witnesses have not Proved that the essential ceremonies had been performed. It was contended that an admission made by the accused regarding the second mamaee. is conclusive of the fact of a second marriage having taken place and that without any other evidence a conviction could be based on such admission. This Court rejected the said contention stating ".....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 :

> Empress v. Pitambur Singh(1), Empress v. Kallu (2) , Archbold Criminal Pleading Evidence and Practice (35th ed.) Art. 3796. In Kallu's case and in Morries v. Miller(3) 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 decision in R. V. Robinson(4) was relied on in the above decision on behalf of the prosecution in support of the proposition that it was not necessary to prove that all the ceremonies required for the particular form of marriage had been observed. After a consideration of the facts in the English decision, quoted above, this Court has expressed the view that the said decision does not support the said proposition enunciated on behalf of the prosecution. We are only adverting to this fact, because the English decision was again referred lo us by Mr. Majumdar; and it is not necessary for us to refer to the same over again excepting to say that the said decision does not advance the case of the appellant.
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> As pointed out earlier, this Court in Kanwal Ram's case has laid down that an admission is not evidence of the fact that the second marriage has taken place after the ceremonies constituting the same have been gone through. As the High Court has dealt with the question regarding the admissibility of admission contained in Ex. 2, we will briefly refer to the nature of the admission that was sought to be relied on against the respondent by the complainant. But we make it clear that the discussion regarding this aspect is only to deal with the contention advanced on behalf of the appellant and to reject the same. The trial Magistrate whose- decision was in favour of the appellant has himself expressed the view that the evidence on the side of the

appellant regarding the alleged second marriage is very scanty. But that, court held that the respondent has admitted the second marriage in Ex. 4, which was an objection filed by the respondent in an application filed by the appellant for maintenance under S. 488 Cr. P.C. We have gone through the said objection petition. The respondent has alleged various acts of misconduct against the appellant and be has merely stated that he was compelled to marry again. But no other narticulars have been given in the said objection mention. We are of the view that no admission of the second marriage by the respnondent with Sandhva Rani can be culled out from Ex. 4. In fact the trial court has based its find ing

1. [1880] I.L.R,. 5 Cal.566.

3. 4 Burr. 2057, 98 E.R. 73,

2. [1882] I.L.R.5 All. 233.

4. [1938] 1 All. E.R. 301, regarding the second marriage almost exclusively on what it considered to be an admission contained in Ex., 4. As there, is no such admission, the finding of the magistrate was clearly erroneous.

Before the High Court, however, we find that the appellant did not place any reliance on Ex. 4. On the other hand she relied on an admission stated to have been contained in Ex.

2. The appellant filed a complaint under s. 494 I.P.C. against the respondent on an earlier occasion on the ground that the latter had contracted a second marriage with Sandhya Rani. That complaint was, however, withdrawn as the particular court had no jurisdiction. In that proceeding the appellant wanted the said Sandhya Rani to be summoned as a witness. To that application, the respondent filed an objection Ex. 2 'wherein no doubt, he has admitted that Sandhya Rani is his wife and that he married her because of the misconduct of the appellant. The High Court considered the question whether this Statement of the respondent in Ex. 2 that he has married Sandhya Rani can be treated as an admission of the fact of the second arriage. The High Court was of the view that the statement contained in Ex. 2 would really be a confession statement and declined to act on the same for two reasons : firstly, that the statement, in Ex. 2 had no,,- been put to the respondent when he was examined under s. 342 Cr. P.C. so as to give him an opportunity to explain the statements contained therein; secondly, that even if the statement contained in Ex. 2 can be taken into account by themselves they will not be proof of the fact that all the essential ceremonies necessary for a marriage have been performed. In our view the reasons given by the High Court are substantially correct. Though strictly the statements contained in Ex. 2 may not be a confession, nevertheless, these statements, if acted upon, tend to incriminate he respondent. The respondent being in the nosition of an accused was entitled to be given an opportunity of offering his explanatiun if any, in resdect of the incriminating statement contained in Ex. 2. Such an opportunity has not been admittedly given to the respondent. His statement in Ex. 2 has not been put to his when be was examined under s. 342 Cr. P.C:

Further as pointed out by this Court in Kawal Ram's case, the admission in Ex. 2 cannot in law be treated as evidence of the second marriage having taken place in an adultery or begamy case: and that in such cases it must be proved by the prosecution that the second marriage as a fact has taken place after the performance of the essential ceremonies. Mr. Majumdar relied on the decision of this Court in Bharat Singh and another vs. Bhagirathi(1) to the effect that the admis-

1. [1966] 1 S.C.R. 606.

sions made by a party are substantive evidence by themselves in view of ss. 17 and 21 of the Indian Evidence Act, and that if those admissions have been duly proved they can be relied on irrespective of the fact whether the party making them appear in the witness box or not or irrespective of the fact whether such a party had or had not been confronted with those admissions. We do not think that the said decision in any way supports the appellant with regard to prosecution for bigamy under s. 494 I.P.C. To conclude, we have already referred to the fact that both the learned Sessions Judge and the High Court have categorically found that the Homo and Saptapadi are the essential rites-for a marriage according to the law governing the parties and that there is no evidence that these two essential ceremonies have been performed when the respondent is stated to have married Sandhya Rani. No reliance canbe placed on the admissions stated to be contained in Ex. 2. For all the above reasons the contentions of Mr. Majumdar have to be rejected. The appeal fails and is dismissed.

V.P.S. Appedl dismissed.
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